

IN THE SUPREME COURT OF IOWA
SUPREME COURT 15-1543

STATE OF IOWA,

Plaintiff-Appellee.

vs.

CARLOS ARIEL GOMEZ GARCIA,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY

Honorable Stuart P. Werling
Judge, Seventh Judicial District

APPELLANT'S FINAL BRIEF

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CERTIFICATE OF SERVICE AND FILING

On the 27th day of July, 2016, the undersigned certifies this brief was electronically filed with the Clerk of the Iowa Supreme Court using the Electronic Document Management System. One copy thereof was transmitted to the Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to:

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO ASSURE A VALID WAIVER OF JURY TRIAL

Authorities

State v. Thompson, 597 N.W.2d 779 (Iowa 1999).

State v. Lucas, 323 N.W.2d 228 (Iowa 1982)

State v. Buck, 510 N.W.2d 850 (Iowa 1994).

Strickland v. Washington, 466 U.S. 668 (1984).

Snethen v. State, 308 N.W.2d 11 (Iowa 1981).

State v. Dible, 538 N.W.2d 267 (Iowa 1995).

Iowa Rule of Criminal Procedure 2.17(1)

State v. Feregrino, 756 N.W.2d 700 (Iowa 2008).

State v. Liddell, 672 N.W.2d 805 (Iowa 2003).

State v. Stallings, 658 N.W.2d 106, 110 (Iowa 2003).

State v. Straw, 709 N.W.2d 128 (2006).

State v. Lawrence, 344 N.W.2d 227, 229 (Iowa 1984).

**II. THE DISTRICT COURT ERRED IN PROVIDING AN
INTERPRETER FOR DEFENDANT WHERE DEFENDANT HAD
DEMONSTRATED AMPLE UNDERSTANDING OF THE
ENGLISH LANGUAGE.**

Authorities

State v. Bugely, 562 N.W.2d 173 (Iowa 1997)

State v. Morrison, 323 N.W.2d 254 (Iowa 1982)

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Graber v. City of Ankeny, 616 N.W.2d 633 (Iowa 2000).

State v. Jordan, 779 N.W.2d 751 (Iowa 2010).

State v. Clark, 464 N.W.2d 861 (Iowa 1991).

Iowa Code § 622A.2.

ROUTING STATEMENT

This appeal raises substantial issues of first impression, issues of public importance requiring determination by the Iowa Supreme Court, and issues upon which there exists a lack of published authority, and is would properly be retained by the Iowa Supreme Court. Iowa R. App.6.1101(2)(c), (d).

STATEMENT OF THE CASE

Nature of the Case: Defendant-Appellant, Carolos Ariel Gomez Garcia, appeals the judgment and sentence entered upon his conviction for Delivery of a Controlled Substance, Cocaine, in violation of Iowa Code section 124.401(1)(c)(2)(b). Defendant was convicted following a bench trial before the Honorable Stuart P. Werling.

Course of Proceedings and Disposition Below: On December 31, 2014, the defendant was charged by trial information with Delivery of a Controlled Substance, in violation of Iowa Code section 124.401(1)(c)(2)(b). (Trial Information, App. p. 1). The defendant filed a written arraignment and plea of not guilty on January 20, 2015, and also demanded speedy trial. (Written Arraignment and Plea of Not Guilty, App. p. 3). On July 13, 2015, a bench trial commenced. (Trial Tr. p. 1). The verdict was pronounced on July 22, 2015, finding the Defendant guilty as charged. (Order and Verdict,

App. p. 7). On September 11, 2015, Defendant was sentenced to serve a period not to exceed ten years. (Sentencing Order, App. p. 14). Notice of appeal was timely filed on September 11, 2015. (Notice of Appeal, App. p. 16).

Facts: Facts relevant to the issues on appeal are set forth in the argument.

ARGUMENT

I. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO ASSURE A VALID WAIVER OF JURY TRIAL.

A. Scope of Review: Because the defendant asserts a denial of the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, review is de novo. State v. Thompson, 597 N.W.2d 779, 782 (Iowa 1999).

B. Preservation of Error: When a claim of ineffective assistance of counsel is made, the Iowa Supreme Court allows an exception to the general rule of error preservation. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982). When the court is presented with an adequate record, the merits of such a claim may be resolved on direct appeal. State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994).

C. **Merits:** Pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 10 of the Iowa Constitution, a criminal defendant is entitled to not only the assistance of counsel, but to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, (1984). The test to be applied to determine if a defendant was denied effective assistance of counsel is “whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency.” Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

When specific errors are relied upon to show the ineffectiveness of counsel, a defendant must demonstrate: (1) that counsel breached an essential duty to the client, and (2) that the defendant was prejudiced. Strickland, 466 U.S. 668 at 687. Counsel is presumed to be competent and the burden is on the defendant to overcome the presumption by a preponderance of the evidence. State v. Dible, 538 N.W.2d 267 (Iowa 1995).

1. *Counsel Breached an Essential Duty*

Defendant was denied the effective assistance of counsel when counsel failed to assure the defendant's waiver was knowing and voluntary

as required by Iowa Rule of Criminal Procedure 2.17(1). Iowa Rule of Criminal Procedure 2.17(1) states:

Trial by jury. Cases required to be tried by jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record within 30 days after arraignment, or if no waiver is made within 30 days after arraignment the defendant may waive within ten days after the completion of discovery, but not later than ten days prior to the date set for trial, as provided in these rules for good cause shown, and after such times only with the consent of the prosecuting attorney. The defendant may not withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the court, in its discretion, may permit withdrawal of the waiver prior to the commencement of the trial.

Iowa Rule of Criminal Procedure 2.17(1) grants criminal defendants a right to waive jury trial within express time constraints. Iowa R. Crim. P. 2.17(1). Up until 30 days after arraignment or ten days prior to the date set for trial, the defendant has a right to waive the jury and proceed to trial by the court, where a defendant makes a knowing and intelligent waiver of his right to jury trial in writing and on the record. Iowa R. Crim. P. 2.17(1). After that time, but not later than ten days after the completion of discovery, the defendant may waive jury trial if he or she is able to make a showing of good cause. Beyond that point, waiver may only occur with the consent of the prosecutor. Iowa R. Crim. P. 2.17(1).

Here, Defendant waived jury trial more than 30 days after the date of his arraignment and on the date set for trial, and there was no record made of good cause or consent by the prosecutor. Additionally, Defendant neither filed a written waiver of his right to a jury trial, nor was there an in-court colloquy to ensure his waiver was knowing and voluntary. Therefore, Defendant's waiver of his right to a jury trial was inadequate under rule 2.17(1).

This court has previously held that the fact that the requirements of rule 2.17(1) have not been met does not necessarily mean that a violation of the defendant's right to a jury trial has in fact occurred or that defendant failed to understand the nature of the right waived by proceeding to a nonjury trial. State v. Feregrino, 756 N.W.2d 700, 707-08 (Iowa 2008). Rather, the question of “whether there has been such an alteration of the fundamental trial framework in violation of the defendant's right to a jury trial depends on the resolution of an antecedent question, namely, whether, notwithstanding the violation of the rule, the defendant knowingly and voluntarily waived his right to a jury trial.” Id. at 708.

In State v. Liddell, 672 N.W.2d 805, 811 (Iowa 2003), the court confirmed an in-court colloquy to be an important tool for a court to determine whether a defendant's waiver of his right to a jury trial is knowing,

voluntary, and intelligent. The Court expressed that a sound method by which the court in an in-court colloquy may determine whether a defendant's waiver of his right to a jury trial is knowing, voluntary, and intelligent, is by inquiring into the defendant's understanding of the difference between a jury trial and a trial by informing him of the following: (1) twelve members of the community compose a jury, (2) the defendant may take part in the jury selection, (3) the jury verdicts must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial. See Id. at 811. The district court should also ascertain whether the defendant is under the mistaken belief that he will receive a benefit from the court or the prosecution for waiving his right to a jury trial. State v. Stallings, 658 N.W.2d 106, 110, 11-12 (Iowa 2003). An in-court colloquy provides the district court with the opportunity to make such a determination.

The record in this matter demonstrates that an in-court colloquy regarding Defendant's waiver of his right to jury trial did not occur and that the court did not advise Defendant of any of the aforementioned considerations. Therefore, there can be no assurance the defendant understood the nature of the right he was waiving or whether he was under the impression that he was going to gain some benefit by waiving his

fundamental right to a jury trial. A written waiver form and/or an in-court colloquy would have addressed these concerns.

Trial counsel breached his duty to the defendant when he failed to ensure the defendant voluntarily and knowingly waived his rights as required by rule 2.17(1). may have informed the Defendant of the nature of the right he was about to waive.

2. Prejudice

Once a claimant proves ineffective assistance, it must also be shown that the error caused prejudice. Strickland, 466 U.S. at 693. To sustain this burden, the claimant must demonstrate “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.

Prejudice in the present case should be presumed. The Iowa Supreme Court has held that prejudice is presumed when the defendant is denied his or her right to a jury trial. State v. Straw, 709 N.W.2d 128 (2006). The waiver of a jury has constitutional implications; for this reason, deciding whether that right has been interfered with should not be undertaken lightly. State v. Lawrence, 344 N.W.2d 227, 229 (Iowa 1984). It is because of these

serious constitutional implications that defendant asserts the error in this matter reaches the level for reversal on grounds of prejudice.

Because trial counsel failed to assure compliance with rule 2.17(1) and Defendant was prejudiced by this failure, the defendant was denied the effective assistance of counsel. Therefore, the defendant's conviction must be reversed and this matter remanded.

II. THE DISTRICT COURT ERRED IN PROVIDING AN INTERPRETER FOR DEFENDANT WHERE DEFENDANT HAD DEMONSTRATED AMPLE UNDERSTANDING OF THE ENGLISH LANGUAGE.

A. **Scope of Review:** The appellate courts generally review a district court's evidentiary rulings for an abuse of discretion. See State v. Bugely, 562 N.W.2d 173, 177 (Iowa 1997) (applying abuse of discretion standard in reviewing admission of other crimes evidence).

An abuse of discretion will not be found unless “such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982) (quoting Buck, 275 N.W.2d at 195. A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.” Graber v. City of Ankeny, 616 N.W.2d 633, 638 (Iowa 2000). Even if a trial court has abused its discretion,

prejudice must be shown before an appellate court will reverse. State v. Jordan, 779 N.W.2d 751, 756 (Iowa 2010). To establish an abuse of discretion, a defendant must show sufficient prejudice to constitute denial of a fair trial. State v. Clark, 464 N.W.2d 861, 863 (Iowa 1991).

B. Preservation of Error: Defendant preserved error in in this matter by making an oral motion to waive use of an interpreter at trial, by objecting on the record to the court’s denial of said motion, and by filing timely notice of appeal.

C. Merits: Under Iowa law, any party in a legal proceeding who is unable to read and understand the English language is entitled to the assistance of an interpreter. Iowa Code § 622A.2. Iowa law does not require use of an interpreter where a party speaks another language, but is able to read and understand the English language.

The question of Defendant’s need for an interpreter was discussed prior to the start of Defendant’ s trial. At that time, defense counsel made an oral motion to waive the use of the presence of interpreters on the grounds that Defendant was fluent in English and that requiring him to have an interpreter would lend to obstructiveness at trial and ultimately prejudice Defendant. Specifically, counsel stated:

Carlos would like to waive the use of the presence of the interpreters. He doesn’t need one. He speaks English and

understands it perfectly. I've met with him numerous times, and we've ever had an interpreter.

An interpreter happened sort of spurt of the moment during an initial bond review hearing, but we never had a hearing for whether that was actually needed, and Carlos has a real concern as to the danger of prejudice from having an interpreter present and interpreting everything for him.

...he understands that he can have one if he wanted one, but he absolutely does not want one. So having one forced on him for a trial, in our view, would deprive him of a fair trial.

(Trial Tr. p. 4, L. 6-25).

The Court indicated that based on its lack of knowledge as to authority on a defendant's right to waive an interpreter, it believed a colloquy akin to that of a defendant's right to waive counsel would be appropriate. (Trial Tr. p. 5, L. 2-11). The court then proceeded to conduct an inquiry, in English, as to the defendant's age and education, whether he understood his charge and the maximum penalty for the charge, and whether he was able to read English and the discovery information provided to him.

(Trial Tr. p. 5, L. 12 – p. 8, L. 14; p. 8, L. 9, L. 3 – 13; p. 10, L. 3 – L. 10).

During the course of this colloquy, Defendant demonstrated he speaks English fluently, understood the nature of his charge and the penalty for said charge, was able to read the discovery information provided to him, and did not have any difficulty understanding his attorney. (Trial Tr. p. 5, L. 12 – p. 8, L. 14; p. 8, L. 9, L. 3 – 13; p. 10, L. 3 – L. 10; p. 11, L. 12-20). Despite

Defendant's showing that he was able to read and understand the English language, the court ordered the interpreters to remain throughout the course of trial, and indicated it would consider a limiting instruction to the jury that they are to make no assumptions based on the fact that an interpreter is present in the courtroom. (Trial Tr. p. 12, L. 6-12, p. 15, L. 1-4). Moreover, the court would not grant a continuance of trial to ascertain whether Defendant could go forward without an interpreter. (Trial Tr. p. 14, L. 25 – p. 15, L. 2).

Defendant's concerns with having an interpreter speaking Spanish through the trial were (1) that it would be confusing to him, (2) that it would be obvious and visible to the jury, and (3) that this visibility may result in prejudice. (Trial Tr. p. 4, L. 17-20; p. 13, L. 21-24, p. 14, L. 3-5, p. 15, L. 11-17; p. 13, L. 18 – p. 14, L. 5, p. 15, L. 11-17, p. 16, L. 13-14). Both the State and defense counsel agreed that having an interpreter standing near them speaking Spanish would be incredibly distracting. (Trial Tr. p. 12, L. 16-24). Defendant demonstrated his apprehension and anxiety with regard to the prejudicial effect the use of a reporter may have on his case by promptly waiving his right to a jury trial following the court's denial of his request to waive use of the interpreters.

Defendant's language skills were clearly sufficient to understand and participate in the trial proceedings, and there was no evidence presented to establish that interpreters were necessary or would benefit the defendant. Rather, the court essentially forced an interpreter on Defendant irrespective of whether he desired or needed one. Therefore, Defendant urges the court to find that the use of an interpreter in this case was improper and constituted an abuse of the court's discretion that ultimately prejudiced Defendant by placing Defendant in a position of waiving his right to trial by jury.

CONCLUSION

WHEREFORE, for the above reasons, Appellant respectfully requests his conviction be reversed and the matter remanded for new trial.

REQUEST FOR ORAL SUBMISSION

Counsel for Defendant-Appellant respectfully requests that she be heard in oral argument upon the submission of this case.

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ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify this case was filed electronically using the Electronic Document Management System and there were no costs associated with this filing.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitation of Iowa R. App. 6.903(1)(g)(1) or (2) because:

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Dated: July 27, 2016

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